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YALE LAW JOURNAL

VOL. X.

JUNE, 1901.

No. 8

* THE LAWYER AND THE STATE.

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Rufus Choate said of the legal profession that better than any other calling in life it enabled its members to serve the State. It is this, he says, which "raises it from a mere calling by which bread, fame, and social place may be earned, to a function by which the republic may be served. It raises it from a dexterous art and a subtle and flexible science, from a cunning logic, a gilded rhetoric, and an ambitious learning, wearing the purple robe of the sophists, and letting itself to hire, to the dignity of almost a department of government—an instrumentality of the State for the well being and conservation of the State." And in the pages of history we shall find abundant justification of the tribute thus expressed.

There are, as you are aware, two great systems of jurisprudence; the system of the English common law and that of the Roman civil law. Happily for the cause of true liberty the civil law was never able to supplant the common law in England, else would the history of English institutions have been very different indeed. The credit is due to the common lawyers of England that they withstood and defeated the ecclesiastics

* Being a portion of the address delivered at the Commencement of the Women's Law Class at the University of New York, April, 1901.

in their attempts to fasten upon the people the Roman system of jurisprudence. The foreign clergy who came into England during the reigns of the Conqueror and his two sons, were ignorant of the common law but well versed in the civil law. They threw all their influence in favor of Roman jurisprudence, banished the study of common law from the monasteries and universities, introducing in its place the study of the civil law. As the administration of justice was mainly in the hands of the clergy they would have succeeded in their attempt had it not been for the lawyers who insisted on maintaining the old system of the common law, and who being excluded from the Universities of Oxford and Cambridge, formed a collegiate body of their own, for the study of the common law, which was known as the Inns of Court and Chancery.

One of the most splendid passages in English history is that which tells how Coke carried through Parliament the Petition of Right, the second Magna Charta of English liberties. It was when James I. sought to subvert a government of laws by the issuance of proclamations, that Coke, then Chief-Justice of the King's Bench and the greatest master of English law that had appeared, preserved the safeguards of English liberty by answering him thus: "The king cannot change any part of the common law, nor create any offense by his proclamation which was not an offense before, without Parliament." James exclaimed in rage: "Then am I to be under the law, which it is treason to affirm?" And Coke nobly answered him: "Thus wrote Bracton, '*Rex non debet esse sub homine, sed sub Deo et lege.*'"

The acquittal of the seven bishops, in June, 1688, has been said to as much mark an epoch in English history as the battle of Waterloo. The victory gained by Pemberton, Pollexfen, and John Somers was worth more to the people of England than many a victory won amid clash of arms on fields of blood. Macaulay has described in dramatic language that great event, and the reader almost imagines he hears even now the acclamations which broke forth that day, and sees the thousands who sobbed aloud for very joy, when the jury gave in their verdict.

In 1792 the government of Great Britain instituted the famous prosecution of Thomas Paine. A retainer for the defendant was sent to Erskine, and the Prince of Wales urged him to decline its acceptance, but to no purpose. "I will forever, at all hazards," exclaimed Erskine, "assert the dignity, inde-

pendence and integrity of the English bar, without which, impartial justice, the most valuable part of the English constitution, can have no existence. From the moment that any advocate can be permitted to say that he will or will not stand between the crown and the subject arraigned in the court where he daily sits to practice, from that moment the liberties of England are at an end." This cost him the office of Attorney-General to the Prince, to which he had been appointed in 1786. It brought down upon him alike the opposition of friends and foes. But his name is mentioned by posterity as the vindicator of his country's liberties. To say that the British constitution has been preserved by the bench and bar, is to speak within the bounds of truth and soberness.

Those who have studied the history of the French Revolution have learned that it was the lawyers who mainly contributed to the overthrow of the French monarchy in 1789. In every district of France they preached the doctrine of the Revolution and were the real leaders of the people. When the States-General assembled, the great majority of the members in the third-estate were lawyers. "There is," says Carlisle, "a new recognized *noblesse* of lawyers whose gala-day and proud battle-day even now is." From that time to this the lawyers have been the most dangerous enemies which the aristocracy and the monarchy have had to encounter in France.

In the United States the controversies which terminated in the War of the Revolution were upon questions of law. The colonists complained of a violation of their legal and constitutional rights, and the champions of the people were the lawyers who instructed them as to their rights and inspired them to resist their violation. In all the colonies the lawyers became the leaders of the people in their revolt against the tyranny of Great Britain. It was the lawyers who formulated the American theory of colonial rights, and who pointed out that with the founding of the colonies, and with the establishment of their political system, the king had everything to do and the parliament nothing. They made the colonists believe that the crown was the only tie that bound them to the mother country, and that Parliament was guilty of a usurpation of power in attempting to rule over them. It was from the lawyers that the colonists learned that when they emigrated to America they brought with them the common law for their protection, and that they had a right as the natural subjects of the king to enjoy all liberties and immunities, to all intents

and purposes as if they had been abiding in the realm of England. It was the lawyers who taught the people that they were entitled to claim the privileges of Magna Charta, and that there could be no taxation without representation. When it was sought to transport the colonists from America to Great Britain, it was again the lawyers who taught them that by English law one accused of crime was entitled to a trial by a jury of the vicinage. And it was they who taught them that by English law the premises of the people were not exposed to searches, nor their persons, papers, or property to seizures on general warrants. When James Otis, in 1761, made his famous argument against writs of assistance, he is said to have laid the first log of the pile which afterwards made the great blaze of the Revolution. "American independence," so declared John Adams, who listened to the argument, "was then and there born. The seeds of patriots and heroes, to defend the vigorous youth, were then and there sown." It was to Mr. Adams, as his son expressed it, "like the oath of Hamilcar administered to Hannibal." So it was a lawyer in the Revolutionary Convention of Virginia who cried out, "— We must fight! An appeal to arms, and to the God of Hosts, is all that is left us. * * I know not what course others may take; but as for me, give me liberty or give me death!" In each one of the colonies, the lawyers, speaking words of flame, set all America on fire.

When independence was secured and it became necessary to lay anew the foundations of government, the lawyers again became the leaders of the people. As it was the work of the first generation of American lawyers to conduct the "transcendent controversy" which preceded the Revolution, so was it "the higher praise of the second generation" that they constructed the American constitutions. The Constitution of the United States, which is said to be "the most wonderful work ever struck off at a given time by the brain and purpose of man," was framed by them. In the Constitutional Convention of 1787 the men of influence, with the exception of Washington and Franklin, were the lawyers, and their number constituted more than one-half of the entire body present. Alexander Hamilton, James Madison, Gouverneur Morris, Rufus King, Charles Cotesworth Pinckney, James Wilson, Roger Sherman, Edmund Randolph, and Luther Martin, as well as other distinguished members of that convention, had enjoyed that preparation for their great work which comes from the study and the practice of the law.

The Constitution thus framed in the main by the lawyers was afterwards adopted by the people chiefly through the influence of the lawyers, in their respective States. The lawyers, Hamilton, Madison, and Jay, for the purpose of explaining the Constitution and dispelling the misunderstanding of it which had obtained a lodgment in the popular mind, wrote the papers called the "Federalist," and thereby made possible the ratification of the Constitution by the people of the States. In doing this they produced a work on the principles of government with which, in the opinion of Chancellor Kent, no other work of its kind can be compared in value, "not even if we resort to Aristotle, Cicero, Machiavel, Montesquieu, Milton, Locke, or Burke." And in this opinion Sir Henry Maine concurred, stating in his book on Popular Government, that "those who have attentively read these papers will not think such praise pitched, on the whole, too high."

In the government thus created, and in each of its departments, the influence of the members of the profession has been great, if not predominant.

Under the Constitution of the United States the judicial department of the government has been advanced in dignity and influence above either the executive or legislative department, as it possesses the power to nullify the acts of either. To it pertains the right to construe Constitutions and pass upon the constitutionality of laws. It defines the limitations which restrict the powers of the States and of the United States. The peace of the community, the prosperity of the citizen, the existence of the government are in its hands. This great department is exclusively filled by lawyers, and they alone can occupy its official places.

The executive department, too, has been in the hands of lawyers. Of the twenty-four presidents of the United States twenty-one have been lawyers and three generals. The advisers of the presidents, their cabinet ministers, have been as a rule members of the legal profession. All but two out of thirty-four Secretaries of State have been admitted to the bar.

In the legislative department of government the lawyers have likewise been in the majority. When Mr. Freeman visited this country some years ago, he declared that the proportion of lawyers in the legislative bodies both of the States and of the Union was something amazing. The Speaker of the House of Representatives, in many respects the most important officer in the government, has been usually a lawyer. Thirty-three

persons have filled that position, one of whom was a physician, one a merchant, one a minister, two journalists, six politicians, and twenty-two lawyers. It is somewhat remarkable, however, that in England, for more than a hundred years, the great prime ministers have generally not been lawyers. Walpole, Chatham, Fox, Canning, Peel, Palmerston, Disraeli, Gladstone, and Salisbury—not one of all this number was a lawyer.

But in this country in each of the departments of government the influence of the legal profession has been potential. Supreme in the judicial department, it has from the beginning guided the policy of the Executive and determined the action of the Congress of the United States. So that it has been said with truth that the influence of the legal profession in moulding the destinies of the nation is superior to that exerted by any other class of its citizens. It pertains to the glory and the dignity of the legal profession in America that it has founded States by framing their Constitutions of government, and has preserved States by interpreting these Constitutions, and by administering and maintaining the laws enacted in accordance therewith.

It is not difficult to understand the influence of the legal profession in public affairs. Its members are, by virtue of their peculiar training and education, the best fitted for the discharge of public duties. In the study of his profession the lawyer is made familiar with the origin, the principles and the operation of government. In beginning the study of law he acquires from the commentaries of Mr. Justice Blackstone a knowledge of the origin and development of the British government, and from the commentaries of Chancellor Kent a knowledge of the law of nations, of the constitutional law of the United States, and of the municipal law of the States. "It is necessary," says Tully, speaking of the Roman senator, "for a senator to be thoroughly acquainted with the Constitution; and this is knowledge of the most extensive nature; a matter of science, of diligence; of reflection, without which no senator can possibly be fit for his office." "How unbecoming," exclaims Blackstone, "must it appear in a member of the legislature to vote for a new law, who is utterly ignorant of the old! What kind of interpretation can he be enabled to give, who is a stranger to the text upon which he comments!" It is because the educated lawyer is possessed of this necessary knowledge that he is best fitted to discharge the duties of the legislator. "While lawyers, and because we are lawyers, we are states-

men," says Choate. And he adds, "we are by profession statesmen."

The lawyers, too, have always been foremost in bringing about all great law reforms. Those only who are skilled in the laws are competent to point out the defects of the law and to suggest the proper remedies. Those who are familiar with the history of law reform, know that the great reformation wrought in the laws of England in the early part of the last century was the result of the efforts put forth by those eminent and accomplished lawyers, Bentham, Romilly, McIntosh and Brougham. So has it ever been in the history of law reform, and so must it ever continue to be. The reformation must proceed from the bar.

But it is not alone in the making, interpreting and administering of law that the legal profession serves the state. It conserves the highest interests of the state by teaching the people a respect for law and for the powers of government. Its studies and offices enable it to repress those opinions through the prevalence of which liberty would die and to diffuse those by which it is kept alive. It impresses on the people those sentiments of obedience and reverence for law, of the supremacy of law over the will of the multitude, without which a government of the people, for the people and by the people cannot long endure.

It is to the honor of the profession that it has always withstood the populace in order to vindicate the majesty of the law. It is regarded as not a mere moral triumph but a sublime act of patriotism that John Adams and Josiah Quincy, Jr., in October, 1770, defended, in the courts of Boston, Captain Preston and his six soldiers of the British army, charged with murder in firing upon the populace under circumstances of such a nature as excited in the minds of the people the greatest indignation and anger. In the discharge of this professional duty, Mr. Adams called down upon himself "a great clamor of rebuke and wrath." He afterwards properly estimated his act when he declared that it was one of the best pieces of service he had ever rendered his country. And so in the trial of Burr, when Marshall "stepped in between Burr and death," though outside the court and throughout the country the people were demanding a conviction, the majesty of the law was vindicated and the highest interests of the republic were secured. A recent occurrence in France has challenged the admiration of the world. Nothing has occurred, since the days of Cicero, that

reflects more honor upon the profession than the heroic conduct of Maitre Labori at Rennes, who without hope of remuneration, and knowing that his life was in danger and that the public sentiment of France condemned him, walked into the arena of justice and vindicated the rights of Captain Dreyfus against the government and the military tribunal of his country.

De Tocqueville based his hope for the continued existence of republican institutions upon the influences which emanate from the legal profession: "Without this admixture of lawyer-like sobriety with the democratic principle, I question," he says, "whether democratic institutions could long be maintained; and I cannot believe that a republic could hope to exist at the present time, if the influence of lawyers in public business did not increase in proportion to the power of the people."